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SUPREME COURT OF THE UNITED STATES.

No. 167.

ENOCH TOTTEN, ADMINISTRATOR OF THE ESTATE OF WILLIAM A. LLOYD, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 15, 1874.

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SUPREME COURT OF THE UNITED STATES.

No. 167.

ENOCH TOTTEN, ADMINISTRATOR OF THE ESTATE OF WILLIAM A. LLOYD, DECEASED, APPELLANT,

VS.

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1 United States Court of Claims.

ENOCH TOTTEN, ADMINISTRATOR OF THE ESTATE of William A. Lloyd, deceased,
vs.
THE UNITED STATES.

No. 6329. Filed May 22, 1871.

Enoch Totten, who sues as the administrator of William A. Lloyd, deceased, by this his petition shows as follows:

That on or about the 13th day of July, 1861, William A. Lloyd entered into a contract with Abraham Lincoln, President of the United States, acting in behalf of the United States, whereby he agreed to proceed to the States then in insurrection against the Government, to obtain, for the use of the United States, information concerning the number, condition, and situation of the troops of the insurgents, and of the plans and projects of the leaders of the rebellion, and to tra'smit the same from time to time, as he might have opportunity, to the said Abraham Lincoln, for which service the United States agreed to pay said Lloyd at the rate of two hundred (200) dollars per month for so long a time as he might continue in said service, together with his reasonable expenses incurred in and about said service. A written memorandum of said contract was drawn and signed by said Abraham Lincoln, and delivered to said Lloyd, but it was subsequently destroyed by said Lloyd, to prevent the same from falling into the hands of
2 the rebel authorities, who had arrested said Lloyd on a charge of being a spy or secret agent of the United States.

After the making of said contract, as aforesaid, the said Lloyd immediately proceeded to the insurrectionary districts, and entered upon the performance of his duties in pursuance of his said contract, and travelled over the rebellious States, and from time to time transmitted to the President of the United States information, in accordance with the terms of his said employment.

He continued to perform his duties under said contract from the said 13th day of July, 1861, to the 5th day of June, 1865, when he returned to Washington City, and was relieved of further duties under the same by the Secretary of War.

The said William A. Lloyd departed this life some time about the 17th day of March, 1868, and the petitioner has been duly appointed administrator of the estate of the said decedent.

The said claim belongs to the estate of said William A. Lloyd, and no part thereof or interest therein has ever been transferred or assigened.

The petitioner and said William A. Lloyd have at all times borne true allegiance to the Government of the United States, and have not, and neither of them has, in any way, voluntarily aided, abetted, or given encouragement to the rebellion against the said Government, and that said petitioner is, and the said Lloyd always was, a citizen of the United States.

The said claim was duly presented to the War Department by said Lloyd, and payment thereof demanded, but the same was rejected, except that part thereof for expenses incurred, which was allowed and paid.

That there is actually due to the estate of said William A. Lloyd for said services as follows:

3 For services as secret agent of the United States in the Southern States, from July 13, 1861, to June 5,

1865, being 46 months and 23 days, at the rate of $200 per month	$9,753 32
For reasonable expensee incurred	2,380 00
	$12,133 32
Deduct payment by the War Department	2,380 00
Balance due	$9,753 32

ENOCH TOTTEN,
Administrator, &c., in person, Washington, D. C.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Enoch Totten, being first duly sworn, deposes and says that he is the claimant named in the foregoing petition; that no assignment or transfer of said claim, or any part thereof, or interest therein, has been made; that he is justly entitled, as administrator, to the amount therein claimed from the United States, after allowing all just credits and off-sets, and that he believes the facts as stated in said petition are true.

ENOCH TOTTEN.

Su'scribed and sworn to before me this 22d day of May, 1871.

[L. S.]

R. J. MEIGS, *Clk.*,
By J. MEIGS, JR., *Ast. Clk.*

4 In the United States Court of Claims, December term, A. D. 1870.

ENOCH TOTTEN, ADMR., &C., *vs.* THE UNITED STATES. } No. 6329.

And the said defendants, by their Attorney-General, come and make answer to the petition of the claimant herein, and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of nine thousand seven hundred and fifty-three dollars and thirty-two cents, the said defendants say that they are not indebted to the said claimant in the said sum of money nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

THOMAS H. TALBOT,
Assistant Attorney-General.

Filed July 28, 1871.

5 In the Court of Claims.

ENOCH TOTTEN, ADMINISTRATOR OF THE ESTATE of William A. Lloyd, dec'd, *vs.* THE UNITED STATES. } No. 6329.

At a Court of Claims held at the Capitol, in the city of Washington,

the 9th day of February, A. D. 1874, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said claimant's petition be dismissed.

By the court.

6 In the United States Court of Claims.

ENOCH TOTTEN, ADMINISTRATOR OF ESTATE of William A. Lloyd, dec'd, *vs.* THE UNITED STATES. } No. 6329.

And now comes the said plaintiff and prays an appeal to the Supreme Court of the United States from the judgment rendered against him in the above-entitled cause.

ENOCH TOTTEN,
Admr., &c.

Filed April 6, 1874.

Ordered, That this appeal be allowed as prayed for.
By the court.
April 6, 1874.

7 United States Court of Claims.

ENOCH TOTTEN, ADMINISTRATOR OF THE ESTATE of William A. Lloyd, deceased, *vs.* THE UNITED STATES.

Findings of fact.

First. On the 13th day of July, 1861, William A. Lloyd, the claimant's intestate, entered into a contract, in writing, with the President of the United States, whereby it was agreed that Lloyd should proceed South and learn the number of troops stationed in the different points and cities in the insurrectionary States, procuring plans of fortifications and forts, and gaining all other information that might be beneficial to the Government of the United States, and report the facts to the President; for which service it was agreed he should be paid $200 per month.

Second. Lloyd proceeded, under a pass in writing to that effect given him by the President, within the rebel lines, and remained there during the entire period of the war, collecting and from time to time transmitting information, traveling from point to point, running great risks, and suffering imprisonment at various times. After the close of the war he presented his account for services to the Secretary of War, and was, in October, 1865, paid $2,380, it being at the same time understood and agreed that such payment was to re-imburse him his expenses, and that by the acceptance thereof his demand for services rendered would not be compromised.

Third. The services of Lloyd were continuous during the war, all of which time he was within the confederate lines, and no payment or adjustment of his account was made by the defendant's officers. He re-

entered the United States lines, at Danville, Va., on the 27th of April, 1865, but did not reach Washington until the 5th day of June, 1865.

And the Court of Claims decides upon the foregoing facts as—

Conclusion of law.

The statute of limitations established by the "Amended Court of Claims act," March 3, 1863, (12 Stat. at L., p. 765, §10,) did not begin to run against the claimant's demand until his intestate had passed out of the insurrectionary districts, and had reached the city of Washington, on the 5th of June, 1865.

But the Court of Claims being equally divided upon the question whether the President possessed power or authority to bind the defendants by the contract which he entered into with the claimant's intestate, as set forth in the foregoing findings, does, for the purposes of an appeal, decide that the petition should be dismissed.

The court delivered no opinion in this case.

JOHN RANDOLPH,
Asst. Clk. C. C.

8 In the Court of Claims.

ENOCH TOTTEN, ADMINISTRATOR OF THE ESTATE of Wm. A. Lloyd, dec'd,
vs.
THE UNITED STATES.
No. 6329.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause and the final judgment of the court thereon, of the application of the solicitor for the claimant for the allowance of an appeal, as filed in the clerk's office April 6, 1874, and of the order of the court allowing the same, of the findings of fact by the court, and the conclusion of law thereon, on which the court founded its judgment.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this day of .

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) No. 167. Enoch Totten, admr., of William A. Lloyd, decd., appellants, vs. The United States. Court of Claims. Filed 15th April, 1874.

IN THE

Supreme Court of the United States.

No. 167.—October Term, 1875.

Enoch Totten, Administrator of the Estate of William A. Lloyd, deceased, Appellant,
vs.
The United States.
} Appeal from the Court of Claims.

Brief for Appellant.

The claimant in this cause filed his petition in the Court of Claims as administrator of the estate of William A. Lloyd, deceased, to recover the sum of $9,753.32, alleged to be due to his intestate for personal services rendered by said intestate as a secret agent in the insurrectionary states, from the 13th day of July, 1861, to the 5th day of June, 1865, in fulfillment of an agreement in writing made between him and the President of the United States on the 13th day of July, 1861.

A traverse was duly filed in the Court of Claims in behalf of the United States, and on the trial of the cause the petition was dismissed by an equally divided court, on the ground that the President of the United States had no lawful power or authority to bind the United States by the contract made with Lloyd. From this judgment the claimant appealed to this court.

The facts in the case, as found by the Court of Claims and certified to this court, are substantially as follows:

On the 13th day of July, 1861, the said Lloyd entered into a contract in writing with the President of the United States, whereby it was agreed that Lloyd should proceed to the states in rebellion and learn the number of troops stationed in different points and cities in the South, procure plans of the fortifications, and gain all such other information as might be beneficial to the United States, and report such facts as he might learn to the President, and for this service it was agreed that Lloyd should be paid at the rate of $200 per month.

The President gave him a pass in writing for that purpose, and he went within the Confederate lines, where he remained during the entire period of the war, collecting and, from time to time, transmitting information, traveling from point to point, running great risks, and suffering imprisonment at various times.

The services of the deceased were continuous during the war within the Confederate lines; he did not re-enter the lines of the Federal army until the 27th of April, 1865, and then at Danville, Va. He arrived in the city of Washington on the 5th day of June, 1865. After the close of the war he presented his claim to the Secretary of War, and was, in October, 1865, paid the sum of $2,380,00; but it was agreed at the time that such payment was only to reimburse him for expenses, and that by the acceptance of that sum his demand for services should not be compromised.

Assignment of Error.

The Court of Claims erred in holding and deciding that the President of the United States possessed no lawful power or authority to bind the United States by the contract mentioned, and in dismissing the petition in the said cause. That court should have rendered a judgment in favor of the complainant for the sum of $9,753,32.

Points and Authorities.

By the terms of the Constitution of the United States the President is Commander-in-Chief of the Army and Navy of the United States. As such officer the President has a right to employ every reasonable means necessary and convenient to accomplish successfully the object of the Constitution in granting the power. "Of all the cases and concerns of government the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."—(3 Story's Con., §1485.) Public officers and public corporations charged with the performance of specified duties may use any proper means reasonably adapted for the purpose.—(*Hodgson vs. Dexter*, 1 Cranch, 345; *Overseers vs. Overseers*, 18 John., 418; *Palmer vs. Vandenburg*, 3 Wend., 196; *Clark vs. Farrington*, 11 Wis., 306; 1 Dillon on Corp., § 55.) The services of secret agents to obtain information for the commanding officer of an army in the field are declared to be necessary by the "army regulations," and the army regulations have the force of law.—(Army Regulations, 95, (672); *Gratiot vs. U. S.*, 4 How., 117; *Martin vs. Mott*, 12 Wheat., 34.)

The President, as commander-in-chief of the army, or the officer actually in command of the army under him, may lawfully establish provisional governments and provisional courts in conquered or re-occupied rebellious territory.—(*Leitensdorfer vs. Webb*, 20 How., 176; The Grapeshot, 9 Wall., 129; *Merchs. and Traders' Bank vs. Union Bank of La.* (Sup. Court U. S.) It seems to follow as a necessary consequence from the exercise of this power that the officer appointed to administer the affairs of these provisional governments, and to conduct the administration of justice in these provisional or temporary courts, should be entitled to receive compensation for their services. The right to recover compensation follows after services rendered

in pursuance of a lawful contract of employment. It would require very plain language from the legislative power to prohibit the commanding officer of an army in the field, during active military operations, from employing guides and spies whenever he might think such services necessary for the successful movement of a campaign. And if the commanding general could lawfully employ persons to render such services, it would certainly not be beyond the power of the Secretary of War to make a like lawful contract. Yet these officers are only the subordinate agents or organs of the President, and their acts are his acts, and must be held to emanate from him.—(*U. S. vs. Eliason*, 16 Peters, 302; *Martin vs. Mott*, 12 Wheat., 31.)

It seems plain, therefore, that unless Congress has imposed some restriction upon the powers of the commander-in-chief in reference to the employment of persons to render the services in question, the President possessed full power to, and did, bind the United States by the contract of the 13th of July, 1861. The only statute which could possibly be construed as a limitation on this power, of which I have any knowledge, is to be found in the tenth section of the act of March 2, 1861.—(12 Stat., 220.) This section provides. amongst other things, that "no contract or purchase shall hereafter be made, unless the same be authorized by law *or* be under an appropriation adequate to its fulfillment." But it is submitted that this provision has no application to contracts for "personal services." It is fair to say that it must be construed in connection with what precedes it in the same section. The preceding provisions require that "all *purchases* and *contracts* for supplies or services in any of the departments of the government, except for personal services," shall be made after advertisement for proposals, unless the public exigencies require immediate delivery. It is the reasonable and proper construction to put upon this language, that the words "contracts and purchases,"

in the last part of the section, are the same as "contracts and purchases" mentioned in the beginning of the section, and that contracts for "personal services" are not included.

If the views before expressed, that this contract was "authorized by law," are correct, it is immaterial whether there was an appropriation or not. It is also submitted that the whole of this section is merely *directory* upon the officers of the government, and that a failure to comply with its provisions could not affect the validity of an executed contract.

But if this section does impose a limitation upon the power of the commander-in-chief to secure sevices of the character involved in this case, the President had at his disposal, at the time of making the agreement, an ample appropriation for the payment of such services.

By the act of 21st June, 1860, the sum of $25,000 was apppropriated for the contingent expenses of the army; by the act approved March 2d, 1861, the same amount was appropriated for the same purpose, and by the act approved July 17, 1861, the sum of $200,000 was given to this fund. By the act of July 13, 1861, the sum of $5,760,000 was appropriated to pay the militia and volunteers, and the act of July 5, 1862, appropriated $500,000 to the contingent fund of the army.—(12 Stat., 66, 202, 255, 263, 501.)

And furthermore, if the appropriations for the contingencies of the army had been exhausted at the time this contract was made, it would have been competent for the President or his Secretary of War, to transfer to that fund any excess remaining to the credit of any other fund in that department.—(2 Stat., 535; 5 Stat., 533.)

After the dates above mentioned, there was no lack of funds to enable the President to employ persons to render such services as might be needful in successfully conducting the movements of the armies in the field.

The only limitation or regulation in regard to the disbursement of the contingent fund of the army is contained in the nineteenth and twentieth sections of the act of August 26, 1842.—(5 Stat., 527.)

That act requires, amongst other things, that each department shall render a detailed statement of the manner in which the contingent fund has been expended; "if for any services rendered, the nature of such services, and the time employed, and the particular occasion or cause, in brief, that rendered such service necessary."

It is one of the obligations imposed upon the President to command the armies, and this is one of the powers incident to the duties of superintending the common defence of the Republic, and such "powers must be so construed as to the modes of their exercise as not to defeat the great end in view."—(*Martin vs. Mott*, 12 Wheat., 30.)

ENOCH TOTTEN.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

ENOCH TOTTEN, ADMINISTRATOR OF THE ESTATE OF WILLIAM A. LLOYD, DECEASED, APPELLANT,
vs.
THE UNITED STATES.
No. 167.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

ENOCH TOTTEN, ADMINISTRATOR of the estate of William A. Lloyd, deceased, appellant,
vs.
THE UNITED STATES.
} No. 167.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

The circumstances of this case are unusual. Upon the 13th of July, 1861, Lloyd, the plaintiff's intestate, engaged with President Lincoln, upon a consideration of $200 per month, to go into the confederate lines as a spy, to procure and forward to the Government military information. Accordingly he went South and performed continuous service during the war, transmitting information from time to time, but receiving no pay or adjustment of account. He went upon duty immediately, and remained within the confederate lines until April 27, 1865, but reached Washington only June 5, 1865.

This action was brought May 22, 1871.

Upon the above facts the Court of Claims concluded that

the plaintiff was not barred by the plea of the statute of limitation interposed for the Government; but, nevertheless, as they were not satisfied that President Lincoln had power to make the contract in question, they gave judgment for the defendants.

In order to reverse that judgment, the plaintiff must show that upon the state of the whole record it was erroneous; *i. e.*, if the doubt as to the second point of law which occurred to the court *were properly founded*, or, because of other elements upon the record fatal to the plaintiff, *were unimportant*, the judgment must stand.

We shall submit, in the first place, that inasmuch as it appears on the face of the record that the suit is barred by the statute of limitations, it is not *important* to the plaintiff that the doubt expressed by the court upon the other point shall be cleared; and, *secondly*, that the transaction with President Lincoln did not give to the plaintiff's intestate a right of suit *so long as there is no outstanding secret service fund applicable to his claim.*

1. The claim is barred by the statute of limitations.

It was brought on the 22d of May, 1871. If at this time the plaintiff had a right of suit he had enjoyed it for a term of full six years, that had expired, at all events, and for his whole claim, on the 14th of May, 1871.

According to the contract Lloyd was to be paid $200 per month. At the close of each month, therefore, he had a claim for so much. After six years elapsed from the time when his claim for that much arose, it became barred. (Rev. Stat., sect. 1069.)

Every month's pay is a fresh item in his account. The authorities that, in accounts of this sort, items less than

six years old do not withdraw items more than six years old from the operations of the statute, are plentiful. (Miller *vs.* Colwell, 2 South., 597; Kimball *vs.* Brown, 7 Wend., 322; Buntin *vs.* Lagow, 1 Blackf., 373.)

More than this, Lloyd's pay was, by the contract and the nature of his employment, measured by the length of his stay within the *rebel lines.* (Record, folio 7.) He left these April 25, 1865, and returned no more. His pay, therefore, ceased upon that day. Or, if it be said that he was employed and to be paid by periods of *months*, his account ceased with May 13, 1865, *i. e.*, the close of forty-six full months since he had entered upon his service.

The bar of the statute, therefore, applies to the whole account.

There is nothing in the state of public affairs to prevent the above application of certain plain rules of law.

The war suspended the statute in favor of loyal parties only as *against parties that were disloyal*, or where the courts were closed.

Lloyd was a loyal man, engaged in the public service of the United States within the confederate lines. There was no reason to prevent his being paid by President Lincoln at any time during the war that his accounts were presented. Whilst transmitting "information" he had power as well to transmit an order for whatever was due him. The presence of such a man within rebel territory imposed no disability *because of vicinage* upon him, and consequently, *vice versa*, gave no occasion for exceptions in his favor in the statute of limitations.

If it could be suggested that the fact that his busi-

ness rendered it difficult for him to apply for money, is *an equity* in his favor, such as to dispose a court to extend the specific exceptions of the statute to the facts of his case, it is well settled that courts cannot, *upon alleged grounds of equity*, add to the exceptions enumerated in the statute. (McIvor *vs.* Ragan, 2 Wh., 25; Bank, &c., *vs.* Dalton, 9 How., 522.)

We conclude, then, that Lloyd, having been at no time under any technical disability to sue for this claim, was barred from such suit as to any monthly item in his account after six years had elapsed from the termination of the month for which it was due, and, therefore, for the whole claim, after six years from April 25, 1865, or, at most, from May 13, 1865.

2. Upon the point whether transactions of the sort under consideration give to the employés therein *a right of suit* against the United States, we submit that the President made the arrangement in question with reference to a "contingency" or "secret-service" fund placed within his power by Congress: (See dates of such statutes given in brief for plaintiff.) That his right to bind the United States for compensation to such employés *was measured by the extent of the fund created for that purpose by Congress*, and that upon the failure of such fund an employé can look only *to Congress* for further appropriation and compensation.

The power of the President, as commander-in-chief, to employ spies, is not disputed, but their *compensation*, just as all similar provisions for expenditures incident to war, must be provided for by legislation; and it seems that, especially in the matter of expenditures which are *secret*, and thus freed from the checks enjoined

by the system of accounts in ordinary cases, there should be a precedent or subsequent sanction by Congress before *a right of suit* arises.

The provisions of the act of 1861, (ch. 84, s. 10, clause 3, 12 Stat., 220,) "No contract or purchase shall hereafter be made unless the same be authorized by law or be under an appropriation adequate to its fulfillment," is not subject to the exception contained in the first clause of the same section as regards "personal services," as is suggested by the learned counsel for the appellant. It is not so either expressly or in the reason of the thing: The exception as to "personal services" is not repeated in the latter clause, and the reason for making it in the former, viz, *the obvious impropriety of seeking for personal services through the medium of advertisement and biddings*, does not apply to the second clause, where the sole question is as to making contracts unauthorized by law; and, apparently, such contracts should be forbidden, whether they be for materials, &c., or for personal services. Accordingly, for this purpose no distinction is made in the third clause between the varieties of contracts in that class.

We do not, however, cite this statute as having much bearing upon the present case, the whole of our contention in regard to which is *that it is of a class that necessarily do not warrant a suit against the United States, unless it be shown that there is an appropriation for secret-service outstanding and applicable.*

S. F. PHILLIPS,
Solicitor-General.